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No. 95-836

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DANIEL J. POSNER, A MINOR,
BY HIS PARENT, LOUIS J. POSNER,

Petitioner,

-against-

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, AND MARY SOLOW, AS DIRECTOR OF CENTRAL SYNAGOGUE NURSERY SCHOOL,

Respondents,

–and–

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner Daniel J. Posner ("Daniel"), a minor by his father, Louis J. Posner, submits this reply brief to the brief for

the United States in opposition[1] and the brief in opposition of respondent Central Synagogue[2].[3] The Respondents fail to address the primary issue which is whether this case is appropriate for review by this Court. Instead, Respondent Central Synagogue engages in a vicious campaign of "mud slinging" and "character assassination" (Res. 3-8, 10) in complete contravention to Rule 24(6) of this Court which provides that a "brief shall be ... free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief which does not comply with this paragraph."

While respondents stridently argue that this case is completely lacking in merit, the reality is that the merits of this case are very strong. In most cases involving disability discrimination involving a child or student, the child is severely disabled and requires substantial accommodations from an institution which claims that its resources are already strained. The instant case is the most egregious example of disability discrimination, because it involves an intelligent, moderately disabled child who only requires minimal accommodation by a private, state licensed day care center that has substantial resources, but which refuses to accommodate the child because

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[1] References prefixed by "US" are to the brief for the United States in opposition.

[2] References prefixed by "Res." are to the brief in opposition of respondent Central Synagogue.

[3] Respondent Mary Solow, as Director of Central Synagogue Nursery School, did not submit a brief in Opposition. Solow is represented by Martin Klein, Esq., who is also the President of Central Synagogue.

of a long-standing policy of excluding all children with disabilities.

ARGUMENT

I. Petitioner Did Not Have A Full and Fair Opportunity to Litigate His Claims in State Court

The United States argues that petitioner's claim of discrimination based on disability had been conclusively resolved against petitioner in State Court and that the Full Faith and Credit Clause, 28 U.S.C. 1738 precludes relitigation of that issue in federal court (US 5); likewise, respondent Central Synagogue argues that the state courts made factual determinations that there was no merit to the claims of discrimination against defendants. (Res. 11-12). Both the United States and respondent fail to address that petitioner did not have a "full and fair opportunity" to litigate his claim and that the state courts applied a completely erroneous legal analysis for determining disability discrimination under the Americans with Disabilities Act of 1990 (the "ADA").

Respondent Central Synagogue admits "counsel had obtained an unsigned copy of the court's decision" and that "they had provided Mr. Posner with documentary proof that they obtained the decision through a commercial lawyers' service..." (Res. 5). This clear and unequivocal admission that the State Court provided an unsigned copy of a decision through formal channels to Respondent Central Synagogue's

counsel is a serious departure from the State Court's own procedures for issuing an official opinion of the Court. While federal Courts may be required to give collateral estoppel effect to an erroneous decision of a state court, the federal Courts should not be required to give collateral estoppel effect to a decision tainted with impropriety. Clearly, petitioner Daniel did not have a FAIR opportunity to litigate his claim in state court.

II. The State Court Determinations Even if Afforded Collateral Estoppel Effect Do Not Conclusively Determine the Discrimination Issue Because They Applied an Erroneous Legal Standard

The appropriate legal analysis for determining disability discrimination under the ADA for a pre-school child is set forth in Brandon Richard Roberts v. KinderCare Learning Centers, Inc., 896 F. Supp. 921 (Minn., 3rd Div. 1995). Brandon Richard Roberts ("Brandon") was a four year-old boy who "had an extremely limited vocabulary, did not play with toys, was developmentally delayed, suffered from seizures, was not toilet trained, was committing self-injurious acts, suffered from attention-deficit hyperactivity disorder [ADHD], and had a tendency to "bolt" or run away. Brandon was "disabled" within the meaning of the ADA" Brandon at 923. The district Court in Brandon noted that discrimination under the ADA constituted a failure to reasonably accommodate the disabled child, but noted that KinderCare was not required to reasonably accommodate Brandon if it could "demonstrate that taking such steps would fundamentally alter the nature of the ... service ... or accommodation being offered," or that the public

accommodation would have to endure an undue financial burden in order to provide its service to a disabled child. 42 U.S.C. § 12182(b)(2)(iii).

Under the Brandon analysis, the District Court ruled in favor of defendant KinderCare based on evidence and testimony submitted at trial and held that KinderCare had no duty under the ADA to provide the one-on-one care to Brandon required due to the severity of his disabilities because providing such care would fundamentally alter the nature of KinderCare's business, and would place an undue financial burden on KinderCare. The District Court in reaching its determination that the accommodations would fundamentally alter the nature of services provided, noted that KinderCare is in the group child care business and does not seek to provide individual child care. Under the undue burden test the District Court determined that KinderCare which operates "on a shoestring budget" would have to have a full-time care-giver to ensure one-on-one care for Brandon at a cost of $200 per week, plus benefits, as compared to the $105 per week in tuition received for Brandon's child. Brandon, at 926.[4]

The State Court decisions in which the federal courts claimed had collateral estoppel effect erroneously used a traditional "discriminatory intent" analysis appropriate for a discrimination case under Title VII of the Civil Rights Act of

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[4] Brandon's attorneys, Gray, Plant, Mooty, Mooty & Bennett, of Minneapolis, Minnesota, have appealed this case to the U.S. Court of Appeals for the Eighth Circuit. "Child Care and the ADA: Litigation Updates," Exceptional Parent, February 1996, vol. 26, Issue 2, Publ. Psy-Ed Corporation, by Maria Gil de Lamadrid, Esq., p. 42.

1964, 42 U.S.C. 2000e-1. Disability discrimination is fundamentally different than discrimination by reason of race, religion, or ethnic origin and the state court's ignorance in applying an erroneous legal standard should not be a basis for invoking collateral estoppel for discrimination by reason of disability.

Under the Brandon analysis, respondents have clearly and unequivocally discriminated against Daniel by reason of his disability. For Central Synagogue to have accommodated Daniel's disability by closing the door, installing a children's gate, or requiring its own personnel to safeguard the open door would not have fundamentally altered the nature of services provided by Central Synagogue Nursery School or have caused an undue financial burden to Nursery School.

Nursery School, as a day care provider, has a duty to ensure the health, safety and welfare of children under its care. Restricting access from the classroom for children at age three relates to the nature of these services provided and it is the universally accepted practice of day care centers across the country to keep the classroom door closed or to implement other reasonable methods of restricting ingress and egress to the classroom. A request to restrict access to and from a classroom due to reasonable heightened concerns for the safety of a disabled child with a neurologically based receptive and expressive communication disorder and co-existing attentional deficit hyperactivity disorder (ADHD) does not in any way, shape, or form fundamentally change the nature of the services provided by a state licensed day care center.

Under the second prong of the Brandon analysis, the accommodations for Daniel's disabilities does not impose an undue financial burden on Nursery School which charges $5,200 for a half-day of tuition, as compared to the $25 cost for the purchase of a children's gate for the classroom door. Nursery School, located on Manhattan's East Side between Park Avenue and Sutton Place, provides care to children from Manhattan's affluent community and can well afford the $25.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari and, upon review, should reverse the Judgment of the Second Circuit affirming the opinion and order of the District Court granting Summary Judgment in favor of the defendants and dismissing the complaint.

Respectfully Submitted,

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